

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 83 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

RAMAKANT GOPALSHARAN SHAHU

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 83 of 2004
MR US BRAHMBHATT for Appellant
THROUGH JAIL for Appellant
MR IM PANDYA, APP for Respondent
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CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 03/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

The present appellant has been convicted by the learned Addl. Sessions Judge, Bharuch and 4th Fast Track Judge, Rajpipla, in Special NDPS Case No.4 of 2002 vide judgment and order dated 31-12-2003 for the offence under Sec.8(c) which is punishable under the provisions of Sec.20(b) of the Narcotic Drugs and Psychotropic Substances Act ('NDPS Act' for short) to undergo R.I. for 10 years and a fine of Rs.1,00,000/- and in default, to undergo further R.I. for five years. Being aggrieved and dissatisfied, this appeal has been preferred through Central Jail, Vadodara.

2. When the appeal has come up for hearing, Mr.U.S.Brahmbhatt, who has been appointed as the counsel to appear on behalf of the appellant, has stated at the bar that he would restrict his arguments only on the point of sentence and, therefore, at the time of admission, the appeal was ordered to be placed on the final hearing board today.

3. The short facts are that Shri H.K.Rathod, P.I. of Rajpipla Police Station, received a secret information while on duty on 27-2-2002 that one Ramakant Gopalsaran Shahu of Village Kumas used to keep prohibition muddamal in his house and dealing in the same. On receipt of said information, he called the panchas and appraised them of the information. As they showed willingness to act as panchas, after preparing primary panchnama, he along with police personnel and panchas went to Amthela Outpost and covered the house of Ramakant Gopalsaran Shahu. The party introduced themselves to the said person and informed him regarding the secret information. On a search being conducted in his house, no prohibition muddamal was found. Upon further search, they found ganja hidden in the house enclosed in a rexin packet hanging on the wire meant for drying clothes. On opening the same, there found branches and leaves and on smelling, it was found to be ganja and, therefore, he called the weighing person. On weighing, it was found to be 1 Kg. and 300 gms. Out of that, 10 gms of ganja was taken as sample and it was properly sealed and put the slip signed by panchas and police as described in the panchnama. Panchnama to that effect was drawn there itself. Rest of the muddamal was kept in the rexin packet itself and slip signed by the panchas and police personnel was put on it. Thereafter, complaint was prepared and the accused along with the complaint, panchnama and muddamal was sent to Police Station for

registering the offence where it was registered under the provisions of NDPS Act and accused was sent to judicial custody. Thereafter, further investigation was started. At the end of investigation and on receipt of report from FSL, charge-sheet was submitted and matter was transferred to the Court of learned Addl. Sessions Judge and Fast Track Court No.4, Bharuch, where charge was framed against the accused. As the accused pleaded not guilty to the charge and claimed to be tried, prosecution led oral evidence and produced and relied documentary evidence. On submission of closing purshis by the prosecution, learned Addl. Sessions Judge, Bharuch, recorded further statement of the accused under Sec.313 of the Code of Criminal procedure. After hearing the learned advocates appearing for the respective parties, the accused was convicted as aforesaid.

4. Heard Mr.U.S.Brahmbhatt, learned counsel for the appellant and Mr.I.M.Pandya, learned APP for the respondent-State.

5. As stated earlier, learned counsel for the appellant has restricted his arguments only on the point of sentence and therefore, we are not discussing on other aspects of the case.

6. It is argued by the learned counsel for the appellant that the present appellant was facing the offence under Sec.8(c) which is punishable under Sec.20(b)(i) of the NDPS Act. The amended Act came into force with effect from 2-10-2001 while the incident in question has taken place on 26-7-2002 and, therefore, according to him, the amended Act would be applicable in the present case. Drawing our attention towards the quantity recovered from the present appellant, it is argued that row ganja allegedly recovered from the house of appellant was weighing 1 Kg. and 300 gms. and when it becomes dry by passage of time, its weight would be reduced. He has taken us through Sec.20 of the NDPS Act more particularly 20(b)(i) and (ii) and submitted that the legislature has linked the sentence with the quantity recovered and the word 'may' used in Sec.20 gives discretion to the Court in awarding sentence on the basis of quantity recovered which has not been exercised judiciously by the trial court. According to him, even the alternative sentence in default of payment of fine is also disproportionate, harsh and not according to law.

7. Learned APP for the State has also not disputed the interpretations made and arguments advanced by the

learned counsel for the appellant regarding Sec.20 of the NDPS Act regarding small quantity, commercial quantity and quantity lesser than commercial quantity but greater than small quantity. It is contended that even legislature has also given guideline in Column No.55 of the List of Narcotic Drugs and Psychotropic Substances (hereinafter referred to as 'the List' for short) as to which will be small quantity and which will be commercial quantity and sentence has been decided accordingly.

8. We have gone through Sec.20 more particularly Sec.20(b)(ii)(B) together with column No.55 of the List. Sec.20 reads as under:

"20. Punishment for contravention in relation to cannabis plant and cannabis--Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, -

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-state, exports inter-State or uses cannabis, shall be punishable-

(i) where such contravention relates to Cl.(a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees;

(ii) where such contravention relates to sub-clause (b), -

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;"

Sec.20(b)(ii) stipulates that where contravention relates to sub-clause (b) then, as per Sec.20(b)(ii)(A) involving small quantity, i.e. 1000 gms as per column No.55 of the List, punishment prescribed is rigorous imprisonment for a term which may extend to six months or fine which may extend to ten thousand rupees or both. If the quantity is lesser than commercial quantity but greater than small quantity i.e. more than 1000 gms. but less than 20 Kgs. as per column No.55 of the List, punishment prescribed is rigorous imprisonment for a term which may extend to ten years and fine which may extend to one lakh rupees and if it is a commercial quantity, i.e. 20 Kgs. as per column No.55 of the List, punishment prescribed is rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Here the word 'may' used in these sections gives discretion to the Court by the legislature as regards awarding sentence. Once discretion has been vested with the Court, it has to be used legally, properly and reasonably but not arbitrarily or disproportionately. The legislature has found it imperative that the sentence to be awarded should be on the basis of quantity of the muddamal recovered.

9. In the case before us, since the contraband article recovered from the house of the appellant weighing 1 Kg. and 300 gms. is neither a small quantity nor a commercial quantity but less than commercial quantity and more than small quantity, Sec.20(b)(ii)(B) has to be kept in mind. This means that proportion of sentence in relation to quantity has to be maintained by the Court. If the trial court fails to maintain the proportion and award sentence regardless of quantity recovered, there would be disparity in the sentence awarded. Since the quantity recovered from the present appellant is only 300 gms. more than the small quantity and 19 kgs. less than the commercial quantity, the sentence prescribed may extent to 10 years. However, merely because the sentence prescribed by the legislature may extent to 10 years, it should not ordinarily be awarded by the trial court for the aforesaid period but for a period keeping in mind the quantity of contraband substance recovered. In the present case, the trial court has awarded R.I. of 10 years with a fine of Rs.1,00,000/-which appears to be unjust, improper and disproportionate. Besides, the trial court has not exercised its discretionary power while awarding alternative sentence also. In default of payment of

fine, it has awarded five years R.I. Hence, we are of the opinion that even for fine also, same proportion is required to be maintained.

10. Keeping in mind the intention of the legislature, the sentence and the alternative sentence to be awarded in this type of offence should be linked with the quantity involved. Here the appellant is in judicial custody since 26th July, 2002. He has already undergone sentence of more than two years. In view of the above, if the sentence is reduced to the period already undergone by the present appellant, ends of justice would be met. Hence, the present appeal is required to be partly allowed.

11. This appeal is partly allowed. The sentence awarded by the learned Additional Sessions Judge, Bharuch and 4th Fast Track Judge, Rajpipla, in Special NDPS Case No.4 of 2002 is reduced to the period already undergone by the appellant-accused. The appellant is ordered to be set at liberty forthwith, if not required in any other case.

(R.P.DHOLAKIA, J.)

(SHARAD D.DAVE, J.)

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